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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

L.B. FOSTER COMPANY,

Petitioner,

versus

DAWSON CONSTRUCTION
PLANT LIMITED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED

This case concerns an equipment distributor's attempt to enforce a statutory right of indemnification in Texas against a United Kingdom-based equipment manufacturer for the reimbursement of monies paid in settlement to an injured worker when the equipment failed in West Virginia, on the basis that the equipment was sold and shipped to the distributor in Texas, where it was warehoused and later sold to the worker's employer in West Virginia.

I. DOES A FEDERAL DISTRICT COURT'S ASSERTION OF PERSONAL JURISDICTION OVER A FOREIGN MANUFACTURER WHOSE DEFECTIVE PRODUCT FAILED IN A STATE OTHER THAN THE FORUM STATE, COMPORT WITH THE DUE PROCESS CLAUSE?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6) of this Court's Rules, L. B. Foster Company hereby states that it has no parent corporation, and there is no publicly-held company owning ten percent (10%) or more of the corporation's stock.

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OPINIONS BELOW

The opinions entered by the lower courts that form the basis for this Petition are all unpublished opinions. Accordingly, the Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit, dated February 12, 2001, is set forth in the Appendix at page 1a. The Final Judgment and Memorandum and Order in support of such Final Judgment, dated January 24, 2000, issued by the United States District Court for the Southern District of Texas (Houston Division) are, respectively, set forth on pages and 3a, 4a of the Appendix. The Order denying the Petitioner's Motion for New Trial, dated May 3, 2000, issued by the United States District Court for the Southern District of Texas (Houston Division) is set forth on page 5a of the Appendix.

STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Per Curiam Opinion on February 12, 2001. The statutory basis for this Court's jurisdiction is 28 U.S.C. Section 1254. This Petition is timely filed.

RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Constitutional Provision

Fourteenth Amendment, Section 1, United States Constitution

> All persons born or naturalized in the United States and subject to the

> jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 6, 1999, Jerry and Karen Landers (collectively, the "Landers") filed suit in the U.S. District Court for the Southern District of Texas, Houston Division, alleging damages arising from an accident which occurred in Kanawha County, West Virginia, on April 22, 1996, when Jerry Landers was injured when a piece of sheet piling that was being hoisted overhead fell on him, crushing his leg and causing other injuries.[1] It was subsequently discovered that a shackle (a piece of equipment that grasped the piling for purposes of lifting it) had failed, causing the piling to fall on Mr. Landers.

The Landers' suit alleged that Dawson Construction Plant, Ltd. ("Dawson"), the manufacturer of the defective shackle in question and the Respondent in this case, engaged in substantial and purposeful contacts with the State of Texas by selling and shipping millions of dollars worth of

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[1]The Landers' Texas lawsuit followed unsuccessful attempts to file claims in a state court in West Virginia and a federal district court sitting in Mississippi (the U.S. District Court for the Northern District of Mississippi, Greenville Division). Both of these actions were opposed by Dawson on the basis of jurisdiction, and, in fact, both were ultimately dismissed on that basis.

equipment, including the defective shackle, to Houston, Texas. L. B. Foster Company ("Foster"), the Petitioner in this case, was the distributor of the defective shackle, having purchased the shackle from Dawson and subsequently selling it to Mr. Landers' employer. Foster intervened in the case as a Plaintiff-Intervenor for the purpose of asserting a statutory claim for contribution and indemnity so that it would be reimbursed by Dawson for an $800,000 payment that Foster had previously made in a settlement with the Landers arising from the April 22, 1996 accident.

Dawson filed a Motion to Dismiss, claiming, *inter alia*, that the Trial Court did not possess personal jurisdiction over Dawson because it was a foreign corporation that had virtually no ties to the State of Texas.

On January 24, 2000, the trial court issued a Final Judgment and accompanying Memorandum and Order, in which it granted Dawson's Motion to Dismiss, holding that it did not have either specific or general jurisdiction over Dawson, and dismissing, without prejudice, the entire action.[2]

On February 3, 2000, Foster filed a Motion for New Trial and accompanying Memorandum of Law in Support of Motion for New Trial, in which Foster argued that the trial court had failed to adequately address Foster's separate and independent claim against Dawson when the court dismissed the entire action. Also on February 3, 2000, the Landers filed a Motion for New Trial or for Reconsideration and accompanying Memorandum of Law in Support of Plaintiffs' Motion for New Trial or for Reconsideration.

By Order entered on May 3, 2000, the trial court summarily denied both Foster's and the Landers' respective Motions.

The Landers filed their Notice of Appeal on May 9,

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[2]Because the trial court held that it did not have personal jurisdiction over Dawson, it did not address Dawson's alternate argument that the action was barred by the statute of limitations.

2000. Foster filed its Notice of Appeal on May 22, 2000.[3]

On February 12, 2001, the United States Court of Appeals for the Fifth Circuit issued a Per Curiam Opinion, affirming the trial court's holding that it lacked personal jurisdiction over Dawson.

The Petitioner has filed a Petition for Certiorari to this Honorable Supreme Court based upon issues and argument set forth herein.

REASONS FOR GRANTING THE WRIT

I. A FEDERAL DISTRICT COURT'S ASSERTION OF PERSONAL JURISDICTION OVER A FOREIGN MANUFACTURER WHOSE DEFECTIVE PRODUCT FAILED IN A STATE OTHER THAN THE FORUM STATE, COMPORTS WITH THE DUE PROCESS CLAUSE.

A. The Unresolved Constitutional Issue.

This case presents the issue of whether the U.S. Constitution's Due Process Clause permits a British company to be sued by a company licensed to do business in Texas in a federal district court diversity action on the basis of the British company's purposeful shipment of millions of dollars of equipment (including the defective shackle in question) into the State of Texas, where it was warehoused for later shipment to destinations throughout the United States, including West Virginia where the equipment ultimately failed. Both the Circuit Court and the District Court below held that the assertion of personal jurisdiction over Dawson would not comport with the Due Process Clause, and that the

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[3] The Landers' appeal was subsequently dismissed on procedural grounds, as a result of failing to timely file their initial brief.

stream-of-commerce doctrine[4] could not be applied to assert personal jurisdiction over Dawson. However, neither the District Court nor the Circuit Court fully considered that, while Mr. Landers' physical injury occurred in West Virginia, the jurisdictional analysis should be focused, with respect to Foster's claim against Dawson, on the transaction between Dawson, as the seller and manufacturer of the defective shackle, and Foster, as the purchaser and distributor of the defective shackle. When one focuses on this transaction, rather than Mr. Landers' injury, the conclusion that the District Court possessed personal jurisdiction based on the stream-of-commerce doctrine becomes clear.

B. The Attendant Practical Question.

The attendant practical question that is intertwined with the aforementioned Constitutional issue is this: May a federal district court, using Texas law in this case,[5] assert jurisdiction over a foreign manufacturer who sells and delivers a defective good into a State, when such shipment leads to the distributor suffering a monetary injury stemming from an event in another State? From both a Constitutional and commercial standpoint, these issues are of paramount importance, given the explosion of international trade between the individual States and foreign countries. As this Court recognized more than twenty years ago in *World-Wide*

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[4] "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

[5] "It is by now well-established that the amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits, with 'federal law' entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee." *Kernan v. Kurz-Hastings, Inc.*, 175 F3d 236 (2nd Cir. 1999).

Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980), with respect to interstate commercial transactions:

> The limits imposed on state jurisdiction by the Due Process Clause , in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. As we noted in *McGee v. International Life Ins. Co.* (**citation omitted**), this trend is largely attributable to a fundamental transformation in the American economy: today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

The phenomena of which this Court then spoke can now be seen in the burgeoning international trade between the individual States and foreign countries, **and** the subsequent sale and movement of such imported goods between the States themselves. International commerce now affects all fifty States. The rules governing a State's assertion of personal jurisdiction over foreign corporate defendants have and must continuously evolve to address today's commercial realities. This Court "has continually recognized the need to change personal jurisdiction requirements to accommodate the transformation of the U.S. economy and international trade."[6] As Justice Brennan

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[6] *See* Jason Farber, "NAFTA and Personal Jurisdiction: A Look at the Requirements for Obtaining Personal Jurisdiction in the Three Signatory

pointed out:

> The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause. By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States. In turn, it has become both necessary and, in my view, desirable to allow the States more leeway in bringing the activities of these nonresident corporations within the scope of their respective jurisdictions.[7]

This Court's most recent comprehensive consideration of the issue of personal jurisdiction over foreign corporations and the application of the stream-of-commerce doctrine occurred in *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102 (1987).[8] Many commentators have remarked that the *Asahi* opinion has led to a split among many of the circuit courts with respect to the application of the stream-of-commerce doctrine.[9] And, as set

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Nations," 19 Lyla Intl. C.J. Jan. 1997. (*Mimeo* at 1).

[7] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 422 (1984) (Brennan, J., *dissenting*)

[8] In *Asahi*, a plurality opinion held that a non-resident's injection of a product into the forum state's "stream of commerce" was, by itself, insufficient to confer personal jurisdiction, absent "additional conduct" directed toward the forum state by the non-resident. 480 U.S. at 111.

[9] *See, e.g.,* Connie M. Ericson, "CMMC v. Salinas: The Texas Long-Arm Statute Does Not Reach French Equipment Manufacturer (But Maybe It Should)" 20 Hous. J. Int'l L. 493, 502 (1998). For example, and of importance to this case, the U.S. Court of Appeals for the Fifth Circuit

forth *infra.*, the Constitutional issue presented by this case requires this Court to address it within the practical considerations of the constantly evolving and increasing pattern of international commerce, its domino effect on trade of such imported goods between the States themselves, and the manner in which the stream-of-commerce doctrine will be applied in the future.[10]

C. "Minimum Contacts," the Transaction Between Foster and Dawson, and the Stream of Commerce Doctrine.

The constitutional standards for a State exercising personal jurisdiction over a defendant are: (1) the defendant must establish some minimum, purposeful contacts with the forum; and (2) the exercise of personal jurisdiction must not offend traditional notions of fair play and substantial justice. *Calder v. Jones*, 465 U.S. 783, 788 (1984). The Texas Supreme Court has held that the Texas Long-Arm Statute extends to the limits of federal due process. *See, e.g.*, *Schlobohm v. Schapiro*, 784 S.W. 2d 355, 357 (Tex. 1990).

Foster seeks compensation based on the sale and shipment of the defective shackle by Dawson, which ultimately led to Foster paying $800,000 to settle the Landers' claim against Foster. Relying on the "stream-of-commerce" doctrine, Foster argued to both lower courts that assertion of personal jurisdiction over Dawson would comport with the Due Process Clause on the basis that,

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does not follow the *Asahi* plurality opinion with respect to the so-called "stream-of-commerce plus" doctrine. *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F. 3d 415 (5th Cir. 1993).

[10] "Both the stream of commerce doctrine and the attempts to assert that doctrine against foreign country defendants should continue to grow in importance as this country, and the world economic order of which it is one part, approach the twenty-first century." R. Lawrence Dessem, "Personal Jurisdiction After Asahi: The Other (International) Shoe Drops," 55 Tn. L. R. (1987) (*Mimeo* at 1).

regardless of whether the defective shackle failed in West Virginia, Dawson had more than the requisite "minimum contacts" with Texas, and, accordingly, it was foreseeable that Dawson's shipment of equipment to Petitioner for sixteen years could result in Dawson being haled into a Texas court in the event of a dispute.

Both the District Court and the Circuit Court concluded that Foster could not press its claim for indemnification in Texas because such claim was based on Mr. Landers' injury, which occurred in West Virginia. Because they focused on Mr. Landers' physical injury in West Virginia, both lower courts found that Dawson had not established minimum contacts with the State of Texas to support Mr. Landers' claim being adjudicated there, and Dawson was, therefore, immune from both the Landers' lawsuit as well as Foster's. Neither the District Court nor the Circuit Court found that Foster had misstated the "stream-of-commerce" doctrine. Rather, both courts held that the stream-of-commerce doctrine only supported the assertion of personal jurisdiction over Dawson in Texas, **if** the "injury" in question occurred on Texas soil. The District Court concluded that, because Mr. Landers was injured in West Virginia, the basis for both the Landers' **and** Foster's claim against Dawson must flow from that same injury, stating that "[t]he **Landers'** cause of action does not arise out of or relate to the Texas contacts on which plaintiffs rely to establish jurisdiction." (emphasis added) The Circuit Court summarily agreed with this reasoning and stated, "accordingly, we affirm the judgment of the district court for essentially the same reasons set forth in its well-reasoned opinion."

However, the basis for Foster's independent and statutory claim against Dawson, and the assertion that there exist sufficient minimum contacts between Dawson and Texas, are grounded in Foster's ongoing and continuous placing of equipment into the "stream-of-commerce" (including the defective shackle in question) for sale and shipment to Texas, where such equipment was stored and

from which it was subsequently shipped to destinations throughout the United States, including, in the present case, West Virginia. This case does not involve a foreign manufacturer who had no business ties with Texas. This case does not involve an injury that has nothing to do with Texas. Rather, this case and the injury of which Foster now complains emanates from the commercial transaction and ongoing relationship between Foster and Dawson that continued for sixteen years, which consisted of the selling and shipping millions of dollars worth of equipment by Dawson to Foster in Houston, Texas, including the defective shackle in question.

Thus, there is an actual injury in Texas for which Petitioner seeks to enforce its statutory right to indemnification and compensation.[11] Namely, Dawson's sale and shipment of a defective shackle to Foster in Houston, Texas.

Both the District Court and the Circuit Court considered the basis for Foster's action against Dawson as indistinguishable from the Landers' own claim stemming from the personal injuries suffered by Mr. Landers in West Virginia. The basis for both lower courts' findings can thus be summarized as follows: The "stream of commerce" doctrine only supports an assertion of personal jurisdiction over a foreign manufacturer, if: (1) the injury complained of is directly suffered by the ultimate consumer or user of the product; and (2) such direct injury occurs within the borders of the forum state.

However, Foster believes that the foregoing holding constitutes too narrow an application of the stream of

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[11] Pursuant to Section 82.002(a) of the Texas Civil Practices and Remedies Code (Tex. Civ. Prac. & Rem. Code §82.002(a) (2001), Foster, as the distributor, has a statutory right to indemnification from Dawson, the manufacturer, for any monies paid as a result of the defective shackle, regardless of the manner in which the action against Foster is concluded. *Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, 996 S.W.2d 864 (Tex. 1999).

commerce doctrine. In particular, by narrowly applying the stream of commerce doctrine, the likely result is a squeezing of the reach of U.S. courts against foreign manufacturers who deliver defective products into this country, given the aforementioned increased ease with which products and goods move in international commerce, as well as between the States themselves.[12] Moreover, at the dawn of the twenty-first century, national borders and boundaries are becoming invisible with respect to trade. Today, U.S. distributors more than ever are receiving goods from all over the world for subsequent sale and shipment throughout the U.S.. And,

> [g]iven the increasing ease with which products move in international commerce, narrowing the reach of U.S. courts is a step in the "wrong direction." The more likely it is that consumers and workers will be affected by products manufactured abroad and distributed throughout the United States by parties unaffiliated with the foreign manufacturers, the less fair is it to consumers and workers to limit their ability to hold these manufacturers accountable for their product when they cause injury.[13]

Foster concedes that the District Court and Circuit Court's conclusion that Mr. Landers' West Virginia physical injury has little to do with the State of Texas makes sense. However, the conclusion that, because Mr. Landers' injury occurred in West Virginia, there is no injury in Texas

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[12] *See* Connie M. Ericson, "CMMC v. Salinas: The Texas Long-Arm Statute Does Not Reach French Equipment Manufacturer (But Maybe It Should)" 20 Hous. J. Int'l L. 493, 511 (1998); Russell J. Weintraub, "Asahi Sends Personal Jurisdiction Down the Tubes" 23 Tex. Int'l L.J. 55, 56, 65 (1988).

[13] Ericson at 512.

suffered by Foster to support Foster's own, independent claim becomes less clear upon closer analysis.

Foster's receipt of the defective shackle in question is but one of literally hundreds of shipments of equipment it received from Dawson in Houston, Texas, over the span of sixteen years. Foster's receipt of the defective shackle was not an isolated occurrence.

It appears, however, that neither the District Court or the Circuit Court agreed with the proposition that Foster, a distributor of equipment licensed to do business in Texas, was, itself, a "consumer" of the defective shackle by virtue of its separate transaction with Dawson. Following this Court's reasoning in *World-Wide Volkswagen*, however, it is reasonable and it was, in fact, foreseeable, for the lower courts to assert personal jurisdiction over Dawson in Texas to adjudicate Foster's statutory claim for indemnification that stems from Dawson's sale and delivery to Foster in Texas of a defective shackle over which Foster had no responsibility or control.[14]

Foster acknowledges that this Court in *World-Wide Volkswagen* declined to establish mere foreseeability the single criterion for jurisdiction because it "would in effect

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[14] In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297-98 (1980), this Court stated:

> [i]f the sale of a product of a manufacturer or a distributor ... is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivered its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

appoint the chattel his agent for service of process." 444 U.S. at 296. However, the facts in the present case do not merely rely on the presence of foreseeability, given Dawson's more than minimum contacts with the State of Texas.[15] Foster, however, is not advocating that this Court should establish a new rule that broadly grants a State with the unfettered power to assert personal jurisdiction over a foreign manufacturer merely on the basis that its products "passed through" such forum. Rather, Foster is merely asking this Court to establish the narrow circumstances under which a State such as Texas has a legitimate interest in adjudicating a product liability dispute when the contacts in question are more than merely "random," "fortuitous," or "attenuated." *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985).

Foster further concedes that a plain reading of the cases cited by the District Court in support of its holding follow a general rule that the complained of injury must occur in the forum State under the stream-of-commerce doctrine. *See, e.g., Felch v. Transportes Lar-Mex, S.A.*, 92 F.3d 320 (5th Cir. 1996). And, if one were to agree that the basis for Foster's suit is Mr. Landers' injury in West Virginia, then the analysis ends there. However, by focusing only on Mr. Landers' injury as the basis of Foster's claim, one ignores the act by Dawson of which Foster complains; namely, the sale and shipment of the defective shackle to Foster in Houston, Texas. Ignoring such act would result in Dawson never being required to answer to Foster and the State of Texas for shipping the defective shackle to Texas.

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[15] Justice Brennan, in dissent of *World-Wide Volkswagen*, questioned the wisdom of only applying the stream-of-commerce doctrine to a flow that halts at the user of a product, arguing that there was no reason to distinguish "between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there." 444 U.S. at 300

D. Traditional Notions of Fair Play and Substantial Justice.

This Court analyzes five factors to assess the fundamental fairness of exercising personal jurisdiction over a non-resident defendant.[16]

Both lower courts focused on the Mr. Landers' West Virginia injury as being relevant to whether a Texas court's exercise of personal jurisdiction in Texas would offend "traditional notions of fair play and substantial justice." However, the analysis should begin first with the assumption that Texas may assert personal jurisdiction over Dawson, and, assuming such jurisdiction exists, would it comport with the Due Process Clause of the U.S. Constitution? Under the foregoing analysis, the assertion of personal jurisdiction over Dawson would, in fact, comport with traditional notions of fair play and substantial justice.

In particular, the State of Texas does have a legitimate interest in this dispute. If a product shipped into Texas is not discovered to be defective until after a distributor takes title to it and delivers it to an end-use customer, the distributor should not be penalized by being forced to forego its rights under Texas law to seek recourse against the distributor. *See, e.g.*, Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 215 (5th Cir. 1999) (Texas had interest in dispute concerning alleged fraud of Texas corporation by non-resident). Companies licensed to do business in the State of Texas should have

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[16] Even if minimum contacts exist, the exercise of personal jurisdiction over a non-resident defendant will fail to satisfy due process requirements if the assertion of jurisdiction offends traditional notions of fair play and substantial justice. In determining this fundamental fairness issue, this Court examines (1) the defendant's burden; (2) the forum state's interests; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the state's shared interest in furthering fundamental social policies. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987).

legal recourse in Texas against manufacturers, foreign or otherwise, that deliver defective products into Texas. Accordingly, Texas, and indeed all U.S. jurisdictions, have a vital interest in ensuring that companies that receive defective equipment from foreign manufacturers are not precluded from asserting their rightful claims in court. A foreign corporation should not be permitted to completely skirt the U.S. judicial system, as has Dawson to date. Dawson has to date prevailed in its argument that West Virginia lacks personal jurisdiction. It now argues that Texas lacks personal jurisdiction. If not West Virginia (where the shackle failed), and if not Texas (where the shackle was delivered into the U.S.), then where in the U.S. does Foster, as distributor and innocent bystander, assert a claim against Dawson, the manufacturer of the defective shackle? Dawson's protestation that, as a foreign corporation, it should not be required to defend itself in a foreign legal system, is, by itself and with nothing more, insufficient to show that the Trial Court's exercise of personal jurisdiction would be unfair. Moreover, while the legal system of the United Kingdom is, indeed, different from that of Texas, the fact that Dawson, to date, has effectively secured competent, U.S. counsel to avoid the jurisdiction of several states, including Texas, belies any assertion that Dawson is significantly disadvantaged by these differences.

And, "'[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum will justify even the serious burdens placed on the alien defendant.'" *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 387 (5th Cir. 1989). And:

> Once a plaintiff has established minimum contacts, the burden shifts to the defendant to show the assertion of jurisdiction would be unfair. To show that an exercise of jurisdiction is unreasonable once minimum contacts are established, the defendant must make a

> "compelling case" against it. It is rare to say the assertion is unfair after minimum contacts have been shown. (citations omitted) *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208,215 (5th Cir. 1999).

CONCLUSION

In declining to assert personal jurisdiction over Dawson, the Circuit Court and the District Court have rigidly interpreted the stream-of-commerce doctrine to deny a distributor of a product the right to seek recourse against its manufacturer if the product proves to be defective outside the forum State, despite the distributor having been harmed through monetary injury, and despite the manufacturer having the requisite minimum contacts with the forum State. Foster respectfully requests this Court to grant certiorari to review this important Constitutional issue, find that the District Court may assert personal jurisdiction over Dawson, and reverse and remand the Circuit Court's and District Court's opinions to enable Foster to pursue its claim for statutory indemnification against Dawson.

Respectfully submitted,

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FILED

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00-20475

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JERRY L. LANDERS, et al.,

Plaintiffs,

L.B. FOSTER COMPANY,

Intervenor-Plaintiff-Appellant,

v.

DAWSON CONSTRUCTION PLANT LIMITED,

Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(C.A. No. H-99-2516)

Before WIENER, BARKSDALE, and EMILIO M. GARZA,

Circuit Judges. PER CURIAM:*

In this diversity product-liability case, Intervenor Plaintiff-Appellant L.B. Foster Company ("Foster") appeals the district court's dismissal of its claims against Defendant-Appellee Dawson Construction Plant Limited ("Dawson") for lack of personal jurisdiction. Foster contends that Dawson, although a British company with its principal place of business in the United Kingdom, (1) purposefully established minimum contacts with Texas such that the exercise of jurisdiction over Dawson comports with the due process requirements of the Fourteenth Amendment, and that (2) the exercise of such jurisdiction comports with traditional notions of fair play and substantial justice.fn1 Having carefully considered the record, the arguments and briefs of counsel, and the opinion of the district court, we are satisfied that the motion to dismiss for lack of personal jurisdiction was properly granted, and accordingly we affirm the judgment of the district court for essentially the same reasons set forth in its well-reasoned opinion.

AFFIRMED.

*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

fn1 See Helicoperos nacionales de Columbia S.A. v. Hall, 466 U.S. 408, 413 (1984)

SOUTHERN DISTRICT OF TEXAS

MAY 03 2000

Michael N. Milby, Clerk of Court

No. H-99-2516

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY L. LANDERS, et al.,

Plaintiffs,

v.

DAWSON CONSTRUCTION PLANT LIMITED,

Defendant.

ORDER

L.B. Foster Company's Motion for New Trial (Docket Entry No. 35) is DENIED.

Plaintiffs' Motion for New Trial or for Reconsideration (Docket Entry No. 37) is DENIED.

SIGNED at Houston, Texas, on this 2nd day of May, 2000.

S/ SIM LAKE
UNITED STATES DISTRICT JUDGE

United States Courts
Southern District of Texas
ENTERED

JAN 24 2000

Michael N. Milby
Clerk of Court

No. H-99-2516

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JERRY L. LANDERS, et al.,

Plaintiffs,

v.

DAWSON CONSTRUCTION PLANT
LIMITED,

Defendant.

FINAL JUDGMENT

In accordance with the court's Memorandum and order granting Defendant's Motion for Summary Judgment, this action is DISMISSED without prejudice.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 21st day of January, 2000.

S/ SIM LAKE
UNITED STATES DISTRICT JUDGE

United States Courts
Southern District of Texas
ENTERED

JAN 24 2000

Michael N. Milby
Clerk of Court

No. H-99-2516

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
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JERRY L. LANDERS, et al.,

Plaintiffs,

v.

DAWSON CONSTRUCTION PLANT LIMITED,

Defendant.

MEMORANDUM AND ORDER

Jerry and Karen Landers, residents of West Virginia, brought this action against Dawson Construction Plant Limited, a United Kingdom company with its principal place of business in the United Kingdom, alleging strict liability in tort for a defective product and failure to warn. Pending before the court is Dawson's Motion to Dismiss Under Rule 12(b) (2) and 12(b) (6) (Docket Entry No. 9).

Both the Landers and L.B. Foster Co., intervening plaintiffs,

have responded to Dawson's motion (Docket Entry Nos. 22 and 24). For the reasons explained below Dawson's motion will be granted.

I. Background

This action arises out of an accident on April 22, 1996, in Kanawha County, West Virginia. Jerry Landers, while working on the construction of the Admiral T.J. Lopez Bridge over the Kanawha River, was standing below a load of sheet piling. The load was affixed to a crane by a Dawson-manufactured shackle. When the load had been lifted approximately twenty feet the shackle released the load and it fell on Landers, severely injuring him. See Landers Dawson Construction & L.B. Foster Co., Nos. 98-2709 and 98-2763 (4th Cir. Nov. 2, 1999), Exhibit A to Supplemental Declaration of Louis Smith (Docket Entry No. 14). Jerry Landers and his wife, Karen Landers, brought suit to recover for his injuries.

The Landers are residents of Charleston, West Virginia. See Plaintiff-' Original Complaint at ¶ 1.01 (Docket Entry No. 1). Dawson Construction Plant Limited (Dawson) is a United Kingdom company with its principal place of business in the United Kingdom. See Declaration of Robin Dawson ¶ 2, Exhibit 1 to Defendant's Memorandum in Support of Motion to Dismiss (Docket Entry No. 10). Plaintiffs allege that Dawson made the shackle Jerry Landers was using when he was injured. See Plaintiff's Original Complaint at § 3.01 (Docket Entry No. 1). Dawson does not sell directly to customers in the United States, but instead sells through independent distributors. See Declaration of Robin Dawson ¶¶ 4-5.

L.B. Foster Company (Foster) is an independent distributor of Dawson products in the United States and sold the shackle at issue in the Landers' suit. See Intervening Complaint ¶ 8

(Docket Entry No. 8). Foster is a Delaware Corporation with its principal place of business in Pittsburgh, Pennsylvania. See Intervening Complaint ¶ 2 (Docket Entry No. 8). Dawson owns no financial interest in and retains no management control in Foster. See Declaration of Robin Dawson ¶ 6, Exhibit 1 to Defendant's Memorandum in Support of Motion to Dismiss (Docket Entry No. 10). Until 1997 Dawson shipped all of its products to Foster through Foster's distribution warehouse in Houston, Texas. See id. at ¶ 7, Deposition of Robin Dawson at P. 102, Exhibit 2-D to Defendant's Memorandum in Support of Motion to Dismiss (Docket Entry No 10). All of these sales to Foster were initiated by Foster in Pittsburgh. See Robin Dawson Declaration ¶ 7, Exhibit 1 to Defendant's Memorandum in Support of Motion to Dismiss (Docket Entry No. 10) .

The Landers first brought suit against Foster in a West Virginia state court. Complaint No. 96-C-2340, Circuit Court of Kanawha County, West Virginia, Exhibit 2-A to Defendant's Memorandum in Support of Motion to Dismiss (Docket Entry No. 10). After the suit was removed to the United States District Court for the Southern District of West Virginia on August 1, 1997, plaintiffs' complaint was amended to include Dawson as manufacturer of the shackle. The action against Dawson was later dismissed for lack of personal jurisdiction. See Landers v. Dawson, CA No. 2:97-0797, Memorandum Opinion and Order (S.D. W.Va. Dec. 15, 1997), Exhibit 2-C to Defendant's Memorandum in Support of Motion to Dismiss (Docket Entry No. 10). The Landers then moved to transfer their suit to the Western District of Pennsylvania, where the independent distributor, Foster, was located and where Foster placed orders from Dawson. See Landers v. Dawson, CA No. 2:97-0197, Memorandum Opinion and Order (S.D. W.Va. Oct. 15, 1998), Exhibit 2-S to Defendant's Memorandum in Support of Motion to Dismiss (Docket Entry No. 10). The West Virginia court denied the motion to transfer, and that decision

was affirmed by the Fourth Circuit Court of Appeals. See Landers v, Dawson Construction and L.B. Foster, No. 98-2763 (4th Cir. Nov. 2, 1999), Exhibit A to Supplemental Declaration of Louis Smith (Docket Entry No. 14). The Landers later settled their action against Foster.

The Landers then sued Dawson in the Northern District of Mississippi. See Landers v Dawson, No- 4:99-CV12-EMB, Opinion (N.D. Miss. June 18, 1999), Exhibit 2-H to Defendant's Memorandum in Support of Motion to Dismiss (Docket Entry No. 10). That suit was also dismissed for lack of personal jurisdiction on June 18, 1999. See id. The Landers then sued Dawson in this action. See Plaintiffs' Original Complaint (Docket Entry No. 1). Foster was allowed to intervene by order entered November 22, 1999. See Minutes and Order, No. H-99-2516 (S.D. Tex. Nov. 22, 1999) (Docket Entry No, 26).

It is undisputed that Dawson has the following contacts with the State of Texas: (1) all Dawson products sold through Foster, including the shackle Landers used, were shipped to Foster's distribution facility in Houston, Texas, until 1995 or 1997; (2) Dawson corporate officers have visited the Foster distribution facility in Houston several times; (3) Dawson also ships to another independent distributor located in Texas; and (4) Dawson once shipped a product to Texas for end use at the request of a Missouri distributor to whom the product was sold. Dawson has never sold directly to customers in Texas, and Dawson does not own or control its independent distributors. Dawson is not licensed to do business in the State of Texas and does not maintain an agent for service of process in Texas. Dawson maintains no office, bank account, or employees in Texas and owns no real or other property in Texas. See Declaration of Robin Dawson in Support of Motion to Dismiss (Docket Entry No. 15).

In their complaint the Landers allege that jurisdiction over

Dawson is proper under the Texas Long-Arm Statute because Dawson conducts business in Texas in that Dawson markets, sells, and distributes its products in Texas. Plaintiffs' Original Complaint (Docket Entry No. 1). Dawson argues that it does not have sufficient purposeful contacts with Texas to confer personal jurisdiction. Dawson also argues that the exercise of jurisdiction in Texas would offend traditional notions of fair play and substantial justice. Alternatively, Dawson argues that the Landers' suit is time barred under Texas's two-year statute of limitations for personal injury cases. Because the court finds that it does not have jurisdiction over Dawson, the court does not reach Dawson's limitations argument.

II. Analysis

Dawson moves to dismiss the Landers' complaint under Federal Rule of Civil Procedure 12b(2) for lack of personal jurisdiction. This court may exercise personal jurisdiction over Dawson only to the extent permitted under Texas state law. See Allred v. Moore & Peterson, 117 F.3d 278, 281 (5th Cir. 1997). The Texas long-arm statute "authorizes the exercise of jurisdiction over nonresidents 'doing business' in Texas." Gundle Lining Construction Corp v. Adms County Asphalt, Inc., 65 F.3d 201, 204 (5th Cir. 1995); Schlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex. 1990). The Texas Supreme Court has interpreted the 'doing business' requirement to allow the long-arm statute to reach as far as due process under the United States Constitution will permit. See Schlobohm, 784 S.W. 2d at 357.

The constitutional test for personal jurisdiction involves a two-step analysis: (1) whether a defendant purposefully established "minimum contacts" with the forum state, and (2) whether the assertion of personal jurisdiction would comport with fair play and substantial justice. Burger King Corp. v, Rudzewicz, 105 S.Ct 2174, 2183-84 (1985). The minimum

contacts requirement is satisfied if either (1) the controversy is related to or arises out of the nonresident defendant's contacts with the forum ("specific jurisdiction"), or (2) the defendant has continuous and systematic contacts with the forum state ("general jurisdiction"). See Helicopteros Nacionales de Colombia S.A. v. Hall, 104 S.Ct. 1868, 1872 (1984).

Plaintiffs bear the burden of establishing contacts by the nonresident defendant sufficient to invoke the court's juris diction. See Allred, 117 F.3d at 281. Even if minimum contacts exist, the exercise of personal jurisdiction over a non-resident defendant will still fail to satisfy due process requirements if the assertion of jurisdiction offends "traditional notions of fair play and substantial justice." Burger King, 105 S.Ct. at 2184.

The Landers and Foster argue that specific jurisdiction over Dawson is proper because Dawson shipped the shackle involved in Landers' accident through Foster's distribution warehouse in Texas. The Landers argue that because Dawson purposefully shipped the shackle to Texas, from whence it flowed to an end consumer in West Virginia, their cause of action arises out of Dawson's contacts with the State of Texas.

In evaluating a claim of specific jurisdiction the court focuses on the relationship between the defendant, the forum, and the litigation. See Helicopteros, 104 S.Ct. at 1872 & n.8. A court's exercise of jurisdiction is proper if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities. See Burger King, 105 S.Ct. at 2182. Houston is a large point of entry for goods into the United States it is certainly reasonable for a manufacturer like Dawson to foresee that its goods would be stored for some time in a warehouse in Houston, awaiting distribution

to other markets. It stretches credulity, however, to suggest that wherever those products end up, any harm they might cause arises out of their contacts with the port where they touched American soil. Furthermore, by importing goods through a particular port a manufacturer does not direct its activities at the residents of that forum. This action has nothing to do with the State of Texas. It is an action by West Virginia plaintiffs against a British defendant arising out of an accident that occurred in West Virginia allegedly caused by a product manufactured in Britain and sold from Pennsylvania into Ohio. The Landers' cause of action does not arise out of or relate to the Texas contacts on which plaintiffs rely to establish jurisdiction. See Felch v. Transportes Lar-Mex, S.A., 92 F.3d 320 (5th Cir 1996), citing Arkwright Mut. Ins. Co. v. Transportes, de Nuevo Laredo S.A., 879 F.Supp. 699, 700 (S.D. Tax. 1994) Accordingly, this court does not have specific personal jurisdiction over Dawson.

The Landers and Foster also argue that Dawson has such continuous and systematic contacts with Texas as make general jurisdiction proper in Texas. The Landers argue that Dawson's continual shipments to Foster's distribution facility amount to purposeful availment of the laws and protection of Texas, and that Dawson's products are sold to Texas consumers through Pileco, a Texas-based independent distributor. Dawson argues that its contacts are not sufficient to establish general personal jurisdiction because they were neither systematic nor continuous.

Although a single, significant contact can give rise to specific personal jurisdiction, the level of intentional contact with a jurisdiction required for general jurisdiction to arise is considerably higher. See Jones v. Petty-Ray Geophysical Geosource, Inc., 954 F.2d 1061, 1068 (5th Cir. 1992); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 375 (5th Cir. 1987). In order to be amenable to suit under general jurisdiction in a

forum a defendant must have systematic and continuous contacts with the forum that invoke the benefits and protections of the forum state's laws. See Bearry, 818 F.2d at 375.

The Landers and Foster cite several cases holding that the mere knowledge by a defendant that his product will be carried into a state by the stream of commerce is enough to establish minimum contacts. See, e.g., Ozuna American Home Products Corp., 886 F.Supp. 586, 590-591 (E.D. Tex. 1995). These cases are inapposite, however, because they all deal with the different standards necessary to find specific jurisdiction over the defendant. id at 590. Indeed, the court in Ozuna specifically stated that there was no general jurisdiction over the foreign defendants in that case. ("[T]his court does not have general jurisdiction over the movants in this case."). "Stream-of-commerce" contacts will not support a finding of general jurisdiction. See id. at n.18, citing Bearry v. Beech Aircraft Corp., 818 F. 3d 370, 375 (5th Cir. 1987). More purposeful contacts than those relied upon by plaintiffs would be required to support general jurisdiction.

Dawson's contacts with Texas are strikingly similar to those that the Fifth Circuit found insufficient to grant jurisdiction in Bearry v. Beech Aircraft Corp., 818 F.3d at 375. In Bearry the Mississippi survivors of a plane crash in Louisiana brought suit in Texas against the Kansas manufacturer of the airplane at 372. Beech Aircraft, the defendant, sold products to seventeen independent Texas dealers, including one wholly owned subsidiary dealer. See id. After all sales were conducted and completed in Kansas, the products were shipped to Texas. See id. Beech Air craft personnel visited Texas dealers on occasion to assist with maintenance problems, demonstrate new aircraft, and offer sales incentives. See id. at 373. The court held that dealers selling Beech products for their own account did not create minimum contacts for Beech sufficient to warrant general

jurisdiction over Beech. See Bearry 818 F.2d at 376. The court stated "[i]n short, that Beech products flow into Texas does not create a general presence in that state." Id.

Like Bearry, Dawson's only contacts with Texas have been sales to independent distributors under no control of Dawson and visits by Dawson personnel to Foster's distribution facility in Texas. In short, Dawson's products flowed into Texas on sales negotiated between Pittsburgh and the United Kingdom. As the Fifth Circuit held in Bearry, this is not sufficient to warrant the exercise of general jurisdiction over Dawson in this forum. See Bearry, 818 F.2d at 375. Accordingly, general jurisdiction over Dawson is not proper in this court.

Furthermore, the court concludes that the exercise of jurisdiction over Dawson in this court would not comport with traditional notions of fair play and substantial justice. See Asahi Metal Ind. v. Super. Ct. of Cal., Solano Cty., 107 S.Ct. 1026, 1033 (1987) (plurality opinion, unanimous court on fair play analysis and decision). In evaluating this fundamental fairness issue, the court must examine: (1) the defendants' burden, (2) the forum state's interests, (3) the plaintiff's interest in convenient and effective relief, (4) the judicial system's interest in efficient resolution of controversies, and (5) the states' shared interest in furthering fundamental social policies. Allred, 117 F.3d at 286 n.7. After evaluating these factors the court concludes that it would be unfair to Dawson to exercise jurisdiction against it in Texas.

The unique burdens placed on one who must defend himself in a foreign legal system are given significant weight in assessing the reasonableness of asserting jurisdiction. See Asahi, 107 S.Ct. at 1033. The legal system of the United Kingdom is different from that of Texas, and the distances and difficulties involved for Dawson mitigate against

asserting jurisdiction in Texas. Texas has no interest in or connection to this action. In addition, the Landers' interest in convenient and effective relief would have been better served by appealing the jurisdictional rulings of the West Virginia and Mississippi courts than by suing anew in Texas. The judicial system's interest in efficient resolution of controversies would also be better served by litigation closer to where the witnesses, documents, and parties to this litigation are to be found. These factors convince the court that even if Dawson's contacts were continuous and systematic, personal jurisdiction over Dawson is not appropriate. See Allred, 117 F.3d at 286 n.7.

III. Order

Because the court does not have either specific or general jurisdiction over Dawson, Dawson's Motion to Dismiss (Docket Entry No. 9) is GRANTED.

SIGNED at Houston, Texas, on this 21st day of January, 2000.

S/ SIM LAKE
UNITED STATES DISTRICT JUDGE